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Federal Communications Commission
Washington, D.C. 20554

JAN 28 1998

EX PARTE 11 FILED

RECEIVED

97-192
JAN 30 1998

The Honorable Jim Bunning
U.S. House of Representatives
2437 Rayburn House Office Building
Washington, D.C. 20515-1704

DOCKET FILE COPY ORIGINAL

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Dear Congressman Bunning:

Thank you for your letter dated December 2, 1997, on behalf of your constituent, William L. Scheyer, City Administrator, City of Erlanger, Kentucky, concerning the placement and construction of facilities for the provision of personal wireless services and radio and television broadcast services in his community. Your constituent's letter and attachment refer to issues being considered in three proceedings that are pending before the Commission. In MM Docket No. 97-182, the Commission has sought comments on a Petition for Further Notice of Proposed Rule Making filed by the National Association for Broadcasters and the Association for Maximum Service Television. In this proceeding, the petitioners ask the Commission to adopt a rule limiting the exercise of State and local zoning authority with respect to broadcast transmission facilities in order to facilitate the rapid build-out of digital television facilities, as required by the Commission's rules to fulfill Congress' mandate. In WT Docket No. 97-192, the Commission has sought comment on proposed procedures for reviewing requests for relief from State and local regulations that are alleged to impermissibly regulate the siting of personal wireless service facilities based on the environmental effects of radio frequency emissions, and related matters. Finally, in DA 96-2140 and FCC 97-264, the Commission twice sought comments on a Petition for Declaratory Ruling filed by the Cellular Telecommunications Industry Association seeking relief from certain State and local moratoria that have been imposed on the siting of commercial mobile radio service facilities.

Because all of these proceedings are still pending, we cannot comment on the merits of the issues at this time. However, I can assure you that the Commission is committed to providing a full opportunity for all interested parties to participate. The Commission has formally sought public comment in all three proceedings and, as a result, has received numerous comments from State and local governments, service providers, and the public at large. Your letter and your constituent's letter, as well as this response, will be placed in the record of all three proceedings and will be given full consideration.

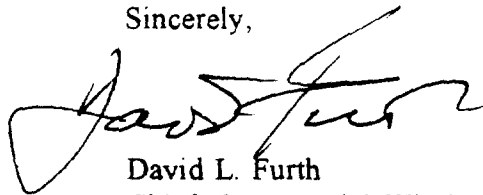
The Honorable Jim Bunning

2.

Further information regarding the Commission's policies toward personal wireless service facilities siting, including many of the comments in the two proceedings involving personal wireless service facilities, is available on the Commission's internet site at <http://www.fcc.gov/wtb/siting>.

Thank you for your inquiry.

Sincerely,

A handwritten signature in black ink, appearing to read "David L. Furth", with a stylized, flowing script.

David L. Furth
Chief, Commercial Wireless Division
Wireless Telecommunications Bureau

JIM BUNNING
4TH DISTRICT, KENTUCKY

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CHAIRMAN, SUBCOMMITTEE
ON SOCIAL SECURITY
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97-182
7901

December 2, 1997

Mr. William Kennard
Chairman
Federal Communications Commission
1919 M Street, NW
Washington, D.C. 20554

Dear Mr. Kennard:

I would appreciate your assistance in answering the enclosed inquiry from a constituent of mine.

As you can see, Mr. Martin has some concerns about the FCC's zoning process for cellular, radio and television towers. Hopefully, you can provide some insight into his questions.

Thank you, in advance, for your help. I look forward to hearing from you.

Best personal regards,


JIM BUNNING
Member of Congress

JB/msh



OCT 28 1997

505 COMMONWEALTH AVE. • P.O. BOX 18818 • ERLANGER, KY 41018 • 606-727-2525

October 22, 1997

Congressman Jim Bunning
2437 Rayburn Building
Washington, D.C. 20515

Dear Congressman Bunning:

I'm writing on behalf of the Mayor and City Council of the City of Erlanger concerning two proposed rules being considered by the Federal Communications Commission. The first significantly constrains local zoning authorities as to the bases upon which they can render zoning decisions related to radio and tv towers. The second limits the types of information which local planning and zoning authorities can consider when reviewing locations for cellular towers. In both cases, the FCC is significantly overstepping its bounds by taking over authority that is clearly local in nature. We vehemently oppose these attempts.


In the case of the cellular towers, the FCC is proposing that if any citizen in a public hearing expresses concern about radio frequency emissions, the decision of the local planning and zoning board can be considered "tainted" and be overturned by the FCC. This is an amazing idea in that it 1) violates citizens' rights to express anything they want in a public hearing, and 2) it allows a federal agency to directly overturn a decision by a local authority without going through the local courts. Both elements are outrageous.

Please, contact Mr. William Kennard, Chairman Designate of the FCC, and urge him not to pass these rules. I am also attaching information from a Michigan law firm that is coordinating resistance to these FCC actions for your use in following up this matter.

Thank you for your support in this effort to prevent federal rulemakers from intruding into the legitimate affairs of the local community.

Sincerely,

CITY OF ERLANGER


William L. Scheyer
City Administrator

A Kentucky Certified City

VARNUM, RIDDERING, SCHMIDT & HOWLETT

ATTORNEYS AT LAW

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H. EDWARD PAUL

MEMORANDUM

FROM: John W. Pestle, Patrick Miles

RE: Federal Preemption of Local Zoning -- Letters to Congress/FCC

DATE: October 15, 1997

Letters are urgently needed to Congress and the Federal Communications Commission (FCC) opposing attempts by the FCC to preempt local zoning of cellular, radio and television towers and make itself a "Federal Zoning Commission" for cellular and broadcast towers. This memo briefly describes the FCC's attempts to preempt local zoning and provides suggested forms of letters to be sent to Congress and to the FCC. We have also attached information on a model cellular zoning ordinance, model lease of municipal property for cellular towers and the two latest FCC zoning preemption rulemakings.

Radio and TV Towers: The FCC has issued a proposed rule that would preempt local zoning of radio and TV towers generally as follows:

- Municipalities must act on zoning requests for broadcast towers within 21 to 45 days. Failure to act would result in the request automatically being deemed granted even though it did not comply with local zoning ordinances.
- Zoning decisions could, at most, be based on safety considerations. Property values, aesthetics and environmental effects could not be considered!
- All appeals of denials or partial denials go to the FCC, not the local courts.

VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP
ATTORNEYS AT LAW

A more detailed summary of this proposed rule is set forth in our September 12 memo, attached.

Cellular Towers - Radiation: Congress expressly preserved local zoning authority over cellular towers in the 1996 Telecommunications Act with the sole exception that municipalities cannot regulate the radiation from cellular antennas if it is within limits set by the FCC. The FCC is attempting to have this "exception swallow the rule" by contending that it can review all local zoning decisions to see if they have been impermissibly "tainted" by concerns over radiation from the towers. The FCC indicates that it may overturn local zoning decisions -- even though they are otherwise completely acceptable -- if it believes they were tainted by radiation concerns.

To implement this, the FCC has indicated that (1) -- claims of "radiation taint" must be appealed to it, not the courts, and (2) -- the FCC need not rely on the reasons a municipality gives for its decisions, but instead may substitute its judgment as to what the "true reasons" were for municipal action. The rule also prohibits municipalities from requiring cellular phone companies to measure the radiation from their towers for compliance with FCC rules. This proposed rule is also summarized in detail in our September 12 memo.

Cellular Towers/Moratoria: In a public notice issued earlier this summer, the FCC is attempting to preempt local moratoria on the siting of new cellular towers. This notice is not summarized in the attached memo of September 12 because comments and reply comments have already been submitted in that proceeding. If you would like a copy of our August, 1997 memo summarizing this moratoria proceeding, please call Nikki Klungle at 616-336-6743, or check our web page at www.vrsh.com.

In general, however, in this rulemaking the FCC is attempting to ban any moratoria that are more than 3 months in duration and to invalidate moratoria that it concludes were tainted by radiation concerns, similar to the above. The FCC disregarded the fact that Congress took away any jurisdiction it would have over such zoning matters and that moratoria are often useful zoning tools to allow municipalities to temporarily suspend certain classes of zoning approvals while needed zoning amendments are made.

Municipal Concerns: In general, municipalities view all of these actions as substantial threats to local zoning authority and vigorously oppose them. The FCC's proposals attempt to make the FCC a "Federal Zoning Board" and:

- Violate principles of Federalism, where zoning is recognized as being a local concern on which the Federal government cannot and should not intrude.
- Violate the Federal telecommunications statutes which, with cellular towers in particular, preserve local zoning authority and prevent the FCC from becoming involved on zoning matters.

VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP
ATTORNEYS AT LAW

- Represent an unprecedented intrusion on local affairs where the FCC can "second guess" true motives for municipal decisions, even where a decision completely complies with applicable law.
- Violates the freedom of speech and right to petition government for municipalities and their residents, by threatening to penalize cities and residents that express concern over radiation from cellular antennas, even if they do so in ways specifically allowed by Congress and the Constitution.
- On broadcast towers, violate constitutional and other protections by allowing some of the tallest structures known to mankind (over 2,000 feet tall) to be built without any local approval and impose timing constraints which bear no relation to local zoning procedures or constitutional protections.
- Improperly prevent property values, aesthetics, or environmental concerns from being considered in zoning broadcast and TV towers and even specify that safety considerations are not paramount.

Suggested Letters: Letters to Congress and to the FCC are one of the more effective ways of registering municipal opposition to these proposals and are urgently needed. Sample letters are attached with specific comments as follows. We have coordinated these with the National League of Cities and other national municipal organizations to support their efforts.

Congressional Letter: A suggested letter to Congress is attached. Please note the significant number of Senators, Representatives and national municipal officials who should be copied on this letter, including your state's two senators. These copyees are essential because they typically are the committee or subcommittee chairs that have oversight over the FCC or are strongly supportive of municipal interests. Copying national municipal organizations will allow them to work more effectively on your behalf on these issues.

FCC Letters: Letters directly to the FCC are needed as well. Again, the suggested form of letter to go to the FCC is largely self-explanatory. It is addressed to the Chairman of the FCC, the four FCC Commissioners and key staffers at the FCC Bureaus involved in the various rulemakings.

To comply with FCC requirements, as set forth on the draft letter, an additional six copies of the letter have to be sent to the Secretary of the FCC, marked "Ex parte letter re cases WT 97-197, MM Docket 97-182 and DA 96-2140" so the Secretary can file two copies each in the dockets for the three proceedings in question.

Additional Materials: In case they are of interest we have attached copies of memos on our model cellular tower ordinance and on our model lease of municipal property (such as water towers, fire stations, parks and the like) for the placement of cellular towers.

[Municipal Letterhead]

[Your two U.S. Senators]

[Your U.S. Representative]

Dear Senator _____, Senator _____ and Representative _____:

We are writing you about the Federal Communications Commission and its attempts to preempt local zoning of cellular, radio and TV towers by making the FCC the "Federal Zoning Commission" for all cellular telephone and broadcast towers. Both Congress and the courts have long recognized that zoning is a peculiarly local function. Please immediately contact the FCC and tell it to stop these efforts which violate the intent of Congress, the Constitution and principles of Federalism.

In the 1996 Telecommunications Act, Congress expressly reaffirmed local zoning authority over cellular towers. It told the FCC to stop all rulemakings where the FCC was attempting to become a Federal Zoning Commission for such towers. Despite this instruction from Congress, the FCC is now attempting to preempt local zoning authority in three different rulemakings.

Cellular Towers - Radiation: Congress expressly preserved local zoning authority over cellular towers in the 1996 Telecommunications Act with the sole exception that municipalities cannot regulate the radiation from cellular antennas if it is within limits set by the FCC. The FCC is attempting to have the "exception swallow the rule" by using the limited authority Congress gave it over cellular tower radiation to review and reverse any cellular zoning decision in the U.S. which it finds is "tainted" by radiation concerns, even if the decision is otherwise perfectly permissible. In fact, the FCC is saying that it can "second guess" what the true reasons for a municipality's decision are, need not be bound by the stated reasons given by a municipality and doesn't even need to wait until a local planning decision is final before the FCC acts.

Some of our citizens are concerned about the radiation from cellular towers. We cannot prevent them from mentioning their concerns in a public hearing. In its rulemaking the FCC is saying that if any citizen raises this issue that this is sufficient basis for a cellular zoning decision to immediately be taken over by the FCC and potentially reversed, even if the municipality expressly says it is not considering such statements and the decision is completely valid on other grounds, such as the impact of the tower on property values or aesthetics.

Cellular Towers - Moratoria: Relatedly the FCC is proposing a rule banning the moratoria that some municipalities impose on cellular towers while they revise their zoning ordinances to accommodate the increase in the numbers of these towers. Again, this violates the Constitution and the directive from Congress preventing the FCC from becoming a Federal Zoning Commission.

Copy List

Senator John McCain
241 SROB
Washington, DC 20510-0303

Senator Conrad Burns
187 SDOB
Washington, DC 20510-2603

Senator Kay Bailey Hutchison
283 SROB
Washington, DC 20510-4304

Senator Slade Gorton
730 SHOB
Washington, DC 20510-4701

Senator Dianne Feinstein
331 SHOB
Washington, DC 20510-0504

Representative Tom Bliley
2409 RHOB
Washington, DC 20515-4607

Representative W. J. Tauzin
2183 RHOB
Washington, DC 20515-1803

Representative Edward J. Markey
2133 RHOB
Washington, DC 20515-2107

Representative John D. Dingell
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Washington, DC 20515-2216

Representative Bob Goodlatte
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Representative James Moran
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Representative Bart Stupak
1410 LHOB
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[Municipal Letterhead]

Mr. William Kennard
Chairman Designate
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Ex Parte Letter Re: Cases WT 97-197, MM Docket 97-182, and DA 96-2140

Dear Chairman Kennard:

Please terminate all action in the preceding cases. They attempt to make the FCC the "Federal Zoning Commission" for cellular and broadcast towers and violate the intent of Congress, the Constitution and principles of Federalism.

Congress and the courts have long recognized that zoning is a matter of peculiarly local concern. The FCC has no zoning knowledge or expertise and is not accessible to most citizens.

For these reasons and others, Congress expressly preserved local zoning authority over cellular towers in the 1996 Act. Now the FCC is trying to get this jurisdiction back by issuing rules which improperly infringe on local zoning authority.

The FCC's efforts to assume jurisdiction over any local zoning matter where RF radiation is mentioned is unacceptable. The FCC ignores the fact that we cannot necessarily control the statements citizens make during meetings of our legislative bodies. Many municipalities, by state or local law, are required to allow citizens to speak on any topic they wish, even on items that are not on the agenda. This is part of what local government is all about.

Some of our citizens may be concerned about radiation from cellular towers. For the reasons just described we cannot necessarily prevent them from mentioning their concerns to us. The FCC's attempt to use this as a means to seize zoning authority and reverse local decisions violates basic principles of Federalism, Freedom of Speech and the rights of our citizens to petition their government.

This is particularly true if a municipality expressly says it is not considering such statements (that go beyond the radiation authority Congress left with municipalities) and the decision is completely valid on other grounds, such as the impact of the tower on property values or aesthetics.

For similar reasons the FCC cannot "second guess" the reasons for a municipality's decision. The FCC, like the courts, is bound by the stated reasons given by a municipality. Either these reasons are sufficient to uphold the decision or they are not. The FCC cannot "second guess" a

List of Copies

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